

No. 11868
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C.
WHITNEY, MARY F. DeBENEDETTI, CLARA
OWENS TURNER, TRINIDAD MORA DOR-
OTHY MORA, DORA GRAJEDA, CONCHITA
GRAJEDA, MARY S. TIBBETTS and GUSSIE
BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

APR 27 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GALLAGHER, MARGOLIS, McTERNAN & TYRE

111 West Seventh Street

Los Angeles 14, Calif.

For Appellee:

JOHN MOORE ROBINSON

ROBERT M. HIMROD

650 South Spring Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division
No. 6343-Y

THELMA TIPTON, et al.,

Plaintiffs,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
BEARL SPROTT, individually and d/b/a BEARL
SPROTT, DOE I, DOE II, DOE III,

Defendants.

THIRD AMENDED COMPLAINT

Come now the plaintiffs, and each of them, and complain against the defendants, and each of them, and allege as follows:

I.

Plaintiffs are all residents of and citizens of the County of Los Angeles, State of California.

II.

Plaintiffs are informed and believe and therefore allege that defendant Bearl Sprott Company, Inc., a corporation, is authorized to and is doing business under the laws of the State of California, with its principal place of business in the City of Torrance, County of Los Angeles, State of California. Said defendant owns, maintains and operates an in-plant cafeteria in Torrance, California, for in-plant feeding of employees of the Columbia Steel Company at Torrance, which said company is engaged in the manufacture and distribution of steel products. [24]

Plaintiffs and each of them are employees of said defendant at said plant in Torrance, California.

III.

At all times mentioned herein, prior to January 1, 1946, plaintiffs are informed and believe, and therefore allege, that defendant Bearl Sprott, individually owned, operated and maintained said cafeteria for in-plant feeding at the Columbia Steel Company plant in Torrance, California; that Bearl Sprott Company, Inc., a corporation, is the successor to Bearl Sprott and has assumed all the assets and liabilities of said Bearl Sprott.

IV.

The jurisdiction of this Court arises under 28 U. S. C., Section 41(a), giving this Court jurisdiction "of all suits and proceedings arising under any law regulating commerce," and under Section 16(b) of the Fair Labor Standards Act, 29 U. S. C., Section 216(b).

V.

That at all times herein mentioned the defendants were and now are engaged in in-plant feeding of employees and business visitors at the Columbia Steel Company plant in Torrance, California. That the Columbia Steel Company plant in Torrance, California, is and was at all times herein mentioned engaged in the manufacture, sale and distribution of steel products. That the greater portion of the products produced at said plant are produced in interstate commerce and are shipped and delivered in interstate commerce to purchasers in other states.

VI.

Plaintiffs are informed and believed and on the basis of such information and belief allege:

1. That at all such times said cafeteria was and is operated by defendants twenty-four hours per day pursuant to rules established for such cafeteria [25] by said Columbia Steel Company for the benefit of the employees of said company at said Torrance plant;
2. That said company at all such times owned the building housing the cafeteria and the greater part of the furniture, utensils, kitchen equipment and tableware utilized therein;
3. That said Company at all such times regulated the hours of operation of said cafeteria, the prices charged for foods served therein and the menus offered, to accommodate the needs and working schedules of said company's employees at said plant;
4. That said Company at all such times charged for and received from defendants 5% of the gross receipts from the operation of said cafeteria;
5. That said cafeteria was and is patronized by substantially all the employees of said company at said plant.

VII.

That plaintiffs, and each of them, are and at all times mentioned were employed by defendants in said cafeteria; that said cafeteria was and is open only to employees and business visitors of said Columbia Steel Company at said Torrance plant and not to the general public; that by virtue of the circumstances hereinabove alleged the processes and services performed by plaintiffs, and each of

them, in such employment were and are necessary to the production, handling and distribution of steel products for interstate commerce by and from said plant.

VIII.

The plaintiffs and their classifications of employment with said defendants are listed as follows:

Thelma Tipton	Steam Table
Mary Foster	Cashier [26]
Eva C. Whitney	Pastry Cook
Mary F. DeBenedetti	Cook
Clara Owens Turner	Fry Cook, Steam Table and Cashier
Trinidad Mora	Canteen Worker, Dish- washer, Salad Girl
Dorothy Mora	Dishwasher
Dora Grajeda	Dishwasher
Conchita Grajeda	Dishwasher
Mary S. Tibbitts	Cook
Gussie Bourne	Bookkeeper, Cashier, Waitress

IX.

On and after October 24, 1940, continuously until the present time, the defendants employed the plaintiffs in this action in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for work weeks longer than 40 hours, and did fail and refuse to compensate said employees for their employment in excess of 40 hours for such work weeks at rates not less than 1½ times the regular rates at which said employees were employed, and said defendants failed and refused to pay to said employees any compensation for hours worked in excess of 40 during each of said work weeks.

X.

Said failure and refusal by said defendants to pay said employees for their employment in excess of 40 hours in each of said work weeks at all, or at rates not less than 1½ times the regular rates at which said employees were employed, was in violation of the Fair Labor Standards Act and Sections 7(a1), 7(a2) and 7(a3) thereof.

Plaintiffs are not informed at the present time as to the exact rate at which they were employed at all of the times mentioned herein, as to the amount of overtime rendered by each of them, or the wages still due and owing them for overtime hours worked for which no payment was made, in violation of the Fair [27] Labor Standards Act. The records of said overtime and hours worked are, or should be under the provisions of the Act, available to and in the exclusive possession of the Defendants herein. Plaintiffs request the Court to order that Defendants make an accounting of said sums due to the employees who are Plaintiffs in this action for overtime wages.

XI.

Plaintiffs are not now informed as to the true names or designations of the Defendants sued herein as Doe I, Doe II and Doe III and whether they are individual, corporate or otherwise. Plaintiffs will ask leave of Court to amend this Complaint and all pleadings herein to insert said true names and designations whether individual, corporate or otherwise, in lieu of said fictitious names, when the same shall have been ascertained.

Wherefore, Plaintiffs pray judgment against defendants, and each of them, as follows:

1. That Plaintiffs, and each of them, are entitled to recover from Defendants.
2. That the Court order an accounting to disclose the amount due to the Plaintiffs, and each of them, for overtime pay.
3. That the Court determine the amount due to each of the Plaintiffs for overtime pay, and enter judgment against Defendants herein for the respective amounts so determined.
4. That an additional equal amount be added as liquidated damages against the Defendants.
5. That Plaintiffs be awarded court costs and reasonable attorneys' fees for Plaintiffs' counsel. [28]
6. For such other and further relief as to this Court may seem just and proper in the premises.

GALLAGHER, MARGOLIS, McTERNAN & TYRE

By John W. Porter

Attorneys for Plaintiffs [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 11, 1947. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

MOTION TO DISMISS

Comes now defendant Bearl Sprott Company, Inc., a corporation, and moves the Court as follows:

To dismiss the action because the *Second* Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

The above motion is based on the following grounds:

1. That this defendant is not and has not been at any time in interstate commerce, or engaged in the production of goods for interstate commerce.

2. That this defendant is and was, and at all times mentioned in plaintiff's First Amended Complaint was, engaged in a retail or service established, the greater part of whose retailing or servicing is and was in intrastate commerce within the meaning [31] of Section 13(a) 2 of the Fair Labor Standards Act of 1938, 29 USCA Section 213(a) 2, and in fact the whole of the selling or servicing of this defendant was in intrastate commerce.

Dated December 29, 1947.

JOHN MOORE ROBINSON and
ROBERT M. HIMROD

By John Moore Robinson

Attorneys for Defendant Bearl Sprott
Company, Inc. [32]

[Endorsed]: Filed Dec. 30, 1947. Edmund L. Smith,
Clerk.

In the District Court of the United States for the
Southern District of California
Central Division

No. 6343-Y

THELMA TIPTON, MARY FOSTER, EVA C.
WHITNEY, MARY F. DE BENEDETTI, CLARA
OWENS TURNER, TRINIDAD MORA, DOR-
OTHY MORA, DORA GRAJEDA, CONCHITA
GRAJEDA, MARY S. TIBBETTS and GUSSIE
BOURNE,

Plaintiffs,

vs.

BEARL SPROTT COMPANY, INC., a corporation,
DOE I, DOE II, DOE III,

Defendants.

ORDER AND JUDGMENT DISMISSING
PLAINTIFFS' COMPLAINT

On the 12th day of January, 1948, at 10:00 o'clock A. M., the motion of the defendant, Bearl Sprott Company, Inc., in the above entitled action, to dismiss plaintiffs' Third Amended Complaint because said Third Amended Complaint failed to state a claim against said defendant upon which relief could be granted, came on to be heard before the Honorable Leon R. Yankwich, Judge of the above entitled Court, in court room No. 5, Federal Building, City of Los Angeles, State of California; the motion was argued by counsel, and thereupon upon consideration thereof, it was ordered, adjudged and decreed that said motion be sustained without leave to amend, and that plaintiffs' action be dismissed on the ground that plaintiffs' Third Amended Complaint failed

to state a claim against defendant Bearl Sprott Company, Inc. upon which relief could [39] be granted, in that defendant Bearl Sprott Company, Inc. was not and had not been at any time engaged in interstate commerce, or engaged in the production of goods for interstate commerce, and, therefore, was not affected by any of the requirements of the provisions of the Fair Labor Standards Act of 1938, Section 7(a), 29 U. S. C. A., Section 207(a); that plaintiffs, employees of Bearl Sprott Company, Inc., were not engaged in any process or occupation necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938, Section 3(j), 29 U. S. C. A., Section 203(j); that said defendant recover its costs incurred and that plaintiffs be adjudged to pay all costs incurred in this action, for which let execution issue.

Dated: January 23, 1948.

LEON R. YANKWICH

District Judge

The within Order and Judgment Dismissing Plaintiffs' Complaint is approved as to form. Dated: January 21, 1948. Gallagher, Margolis, McTernan & Tyre, by John W. Porter, Attorneys for Plaintiffs.

Judgment entered Jan. 23, 1948. Docketed Jan. 23, 1948. C. O. Book 48, page 79. Edmund L. Smith, Clerk; by John A. Childress, Deputy. [40]

Received copy of the within Order and Judgment this 21 day of January, 1948. John W. Porter, Attorney.

[Endorsed]: Filed Jan. 23, 1948. Edmund L. Smith, Clerk. [41]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiffs above named, and each of them, hereby appeal to the Circuit Court of Appeals for the 9th Circuit, from the judgment of dismissal entered in this action on January 23, 1948, in Civil Order Book No. 48, page 79.

Dated: January 29, 1948.

GALLAGHER, MARGOLIS, McTERNAN & TYRE

By John W. Porter

Attorneys for Plaintiffs [42]

[Affidavit of Service by Mail.]

[Endorsed]: Filed & mld. copy to Robinson & Himrod, Attys. for Defts., Jan. 30, 1948. Edmund L. Smith, Clerk. [43]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain full, true and correct copies of Complaint; Second Amended Complaint; Motion to Dismiss; Memorandum of Points and Authorities; Memorandum of Points and Authorities in Opposition to Motion to Dismiss Second Amended Complaint; Third Amended Complaint; Motion to Dismiss; Memorandum of Points and Authorities; Memorandum of Points and Authorities in Opposition to Motion to Dismiss Third Amended

Complaint; Minute Order Entered January 12, 1948; Order and Judgment Dismissing Plaintiffs' Complaint; Notice of Appeal; Notice Designating Papers and Records to Be Incorporated in the Record on Appeal and Appellee's Designation of Additional Portions of Records and Proceedings to be contained in the Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.60 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 24 day of February, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Endorsed]: No. 11868. United States Circuit Court of Appeals for the Ninth Circuit. Thelma Tipton, Mary Foster, Eva C. Whitney, Mary F. DeBenedetti, Clara Owens Turner, Trinidad Mora, Dorothy Mora, Dora Grajeda, Conchita Grajeda, Mary S. Tibbetts and Gussie Bourne, Appellants, vs. Bearl Sprott Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed February 25, 1948.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 11868

THELMA TIPTON, et al.,

Appellants,

vs.

BEARL SPROTT CO., INC.,

Appellee.

APPELLANTS' STATEMENT OF POINTS ON
APPEAL

Appellants hereby state, in accordance with Subdivision 6, Rule 19, of the Rules of this Court, that upon their appeal herein, they intend to rely upon the following points:

I.

The facts alleged in the Third Amended Complaint herein, admitted for purposes of the defendant's motion to dismiss, show that plaintiffs, employed in preparing and serving food in an in-plant industrial cafeteria to workers engaged in the production of steel products for commerce, were and are themselves employed in occupations necessary to the production and distribution of goods for commerce within the meaning of Sec. 3 of the Fair Labor Standards Act. (29 U. S. C. A., Sec. 203.)

II.

The facts alleged in the Third Amended Complaint herein show that plaintiffs were and are not engaged in any retail or service establishment the greater part of whose selling or servicing is or was in interstate com-

merce within the meaning of Sec. 13(a) (2) of the Fair Labor Standards Act.

III.

The Third Amended Complaint states, on behalf of each of the plaintiffs a claim upon which relief may be granted under Sec. 16(b) of said Act. (29 U. S. C. A., Sec. 216(b)).

Appellants hereby designate the following portions of the record herein as necessary to the consideration of the foregoing points:

* * * * *

Dated: March 2, 1948.

GALLAGHER, MARGOLIS, McTERNAN & TYRE

By John W. Porter

Attorneys for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 6, 1948. Paul P. O'Brien,
Clerk.